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ABSTRACT

The Ad Hoc Committee on Copyright Law Revision describes its position in a question and answer format. General questions about the committee and its objectives are followed by a description of the differing needs of copyright holders and educators. Since the committee's primary concern is that educators have adequate access to and use of copyrighted materials, the questions are centered around the fair use doctrine, a limited education exemption, copyright duration, waiver of statutory damages on innocent educational infringers, reproduction by libraries, use of broadcast materials, and use of educational technology, including computers. In each of these areas the existing and proposed laws are described and the committee's recommendations stated. The committee's position on a clearinghouse or statutory licensing system is given, and the requested limited educational exemption is described in detail. A proposed statute titled "Limitation on exclusive rights: Reproduction for teaching, scholarship, and research" is appended. (LS)

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ad hoc committee on
copyright law revision

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QUESTIONS AND ANSWERS REGARDING THE AD HOC COMMITTEE'S POSITION

1. What is the Ad Hoc Committee, What are its Objectives, and When was it Established?

The Ad Hoc Committee (of Educational Organizations and Institutions) on Copyright Law Revision is composed of the nonprofit educational organizations listed in the appendix of this report. (See Exhibit A.)

Its objectives are: (a) to protect the public interest in the revision of the U. S. Copyright Law; (b) to obtain a copyright law which will enable teachers to teach as well as they know how to teach; (c) to make teaching and learning materials as accessible as possible without affecting the potential market for such copyrighted works.

The Ad Hoc Committee was formed in 1963 in the early days of the revision program and has represented to the Congress since that time education's needs and interests in the revision of the law.

2. What is the Problem?

The U. S. Copyright Law, enacted in 1909, is being revised. Successive attempts at revision and updating since then have consistently failed. The proposed legislation puts much greater emphasis on the rights of the proprietors of copyrighted works than on the rights of the consumers/users of copyrighted materials. The Ad Hoc Committee seeks a fair balance between the rights of the author and the rights of the user, bearing in mind that the Supreme Court has said that where there is any conflict between the two the public interest must prevail.

The teacher creates markets for the author's works and gives them visibility. What good is an author's work if no one is interested in reading what he has written? While the Ad Hoc Committee wants to encourage authors to be creative, we also want teachers to be creative in their uses of materials in the classroom. This means using a wide variety of materials and resources for teaching and learning.

Teaching is no longer confined to the use of a single textbook. Creative teachers need bits and pieces of all sorts of written, pictorial and graphic materials geared to "the teachable moment" when students are best ready to learn. Requiring a teacher to purchase a large book in order to use a small portion would simply mean that the teacher would neither buy the book nor use the material.

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3. What are Education's Needs in Any New Copyright Legislation Passed by the Congress?

Teachers and learners in the schools of the '70s need:

a. Reasonable access to print and non-print materials for instructional purposes.

b. Reasonable certainty that a given use of a copyrighted work is permissible. Under-the-table uses must be eliminated.

c. Certainty that the present law's "not-for-profit" principle, granting special exemptions for non-profit uses of copyrighted materials, will be extended.

d. Assurance that teachers who innocently infringe the law will be protected.

e. A new copyright law that will support, rather than thwart, the use of the new technology in the schools.

f. Assurance that the doctrine of "fair use" will be extended to the use of instructional television, computers, automated systems, and other developments in educational technology.

4. What are the Chief Areas of Concern to Education in the Revision of the Law?

a. Fair use

In the present law the "fair use" limitation is a judicially developed doctrine that permits a limited amount of copying without infringement of copyright. The doctrine is one of the most important limitations on the copyright owner's exclusive rights. "The line between fair use and infringement in present law is unclear and not easily defined," according to the Register of Copyrights. The scope and limits are most obscure, so that the issue of "fair use" has been called "the most troublesome in the whole law of copyrighting."

b. Access to materials through a limited educational exemption

In the present copyright law there is a "not-for-profit" exemption which gives, when combined with the "fair use" provision, double-barreled protection to education in using materials for teaching, scholarship, and research purposes. This "not-for-profit" exemption is substantially weakened in the new copyright bills proposed to Congress. The denigration of this provision becomes particularly worrisome to educators in view of the recent Court of Claims decision in the Williams-Wilkins case which makes the doctrine of "fair use" of works by libraries, and by teachers as well, unreliable. Therefore, a more precise protection for the nonprofit educational process requires a limited educational exemption.

c. Duration of copyright

The period of copyright monopoly is the problem.

d. Waiver of statutory damages on innocent educational infringers

Liability of the innocently infringing teachers is the question here.

e. Reproduction by libraries

Liability of the library which reproduces materials for one of its readers is the question at issue here.

f. Use of copyrighted materials on instructional broadcasting and educational technology

This encompasses instructional television and radio, instructional films, dial access systems, computers, etc.

5. Ad Hoc Committee's Recommendations

Listed below are the provisions in the present (1909) law, the proposed bill (S.644, 92nd Congress), and the Ad Hoc Committee's recommendations to the Congress relative to each of the chief areas of concern mentioned in Paragraph 4 above.

a. "Fair use"

Present law: Judicially interpreted by the courts--The claim that a defendant's acts constituted a "fair use" rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. Even though the courts have ruled upon the "fair use" doctrine over and over again, no real definition of the concept has ever emerged. Consequently, each case raising the question must be decided on its own facts. The courts have evolved a set of criteria which provide some gauge for balancing the equities, but these criteria are in themselves insufficient to provide the certainty that teachers and other nonprofit educational users of copyrighted materials need for their own protection. The criteria are as follows: (1) purpose and character of the use; (2) nature of the work; (3) amount of the work; and (4) effect of the use upon the potential market or value of the work.

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Proposed new revision bill: For the first time, statutory recognition is made of the doctrine of "fair use." This doctrine is now to be written into law and will no longer depend merely on judicial interpretation of the courts; the "fair use" statute will also specify for the first time the right of "copying." The bill specifies that the "fair use" of a copyrighted work, including the reproduction of copies for purposes of teaching, scholarship, or research, is not a copyright infringement. The bill adopted the criteria mentioned above as part of statutory law.

Ad Hoc Committee's position: The Committee endorses the language on "fair use" in the proposed bill but wishes to change the language of the House Committee Report 83, 90th Congress, 1st Session, as follows:

(1) Delete on Page 35 the statement: "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection."

Unless the phrase "no matter how minor" is deleted, any copying by teachers, regardless of how insignificant, could be ruled out.

(2) Instructional television should be subject to the same "fair use" provision as are other instructional materials.

b. Limited educational exemption

Present law: A "not-for-profit" exemption exists which, when combined with the "fair use" provision, gives teachers added certainty that any incidental or minor copying which they need to do for their classroom work will not be considered an infringement.

Proposed law: The not-for-profit exemption in the 1909 law has been eliminated.

Ad Hoc Committee's recommendation: The Ad Hoc Committee recommends the addition of a limited educational exemption to be substituted for the not-for-profit exemption which was eliminated in the proposed new bill. (The wording of this exemption is attached herewith. See Limitations on exclusive rights: Reproduction for teaching, scholarship and research.) The recommendation reads: "Notwithstanding other provisions of this act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright."

Owing to the uncertainties created by the Commissioner's opinion in Williams and Wilkins, and the consequent unreliability of "fair use" in providing necessary protection for teaching, scholarship and research, the Ad Hoc Committee believes that it is essential for the copyright law to provide the basis for appropriate rights of reproduction for teaching, scholarship and research.

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c. Duration of copyright

Present law: The duration of copyright is 28 years, plus a 28-year renewal period.

Proposed law: Duration is set at "life of the author plus 50 years."

Ad Hoc Committee's recommendation: Keep the same duration period as in present law: 28 years plus an additional 28-year renewal period. If a change has to be made, then there should be a 28-year period followed by a 48-year renewal period. The Ad Hoc Committee is interested in a short first term and a longer second term in order that materials which are not renewed at the end of the initial 28-year period and pass into the public domain will become available to teachers.

d. Waiver of statutory damages on innocent educational infringers

Present law: No waiver for educational infringers is provided in the law.

Proposed law: A waiver may be allowed by the court at its discretion; if the judge, however, decides not to waive the statutory damages, the amount can go to $50,000 for each infringement.

Ad Hoc Committee's recommendation: Continuance of the waiver allowed in the proposed law but with reduction of statutory damages to a more reasonable figure.

e. Reproduction by libraries

Present law: "Fair use" is the only privilege libraries have under present law.

Proposed law: Provides for the right of libraries to make copies for users and for inter-library loans.

Ad Hoc Committee's recommendations: The Committee holds that copying by a library for a user is not an infringement of copyright. The librarian is a middleman between the proprietor and the user and should not be held responsible if the user infringes the copyright. The user should be responsible for the "fair use" of a work he borrows from the library. The rationale for this is the same as when Western Union sends a message for a patron. Western Union is not held liable for messages sent over its wires; nor is AT&T held responsible for what a subscriber says on the telephone. The Ad Hoc Committee recommends that the new law reflect this same principle regarding reproduction by libraries.

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f. Educational technology, including computers

Present law: No mention is made of these in the 1909 law, which was written before most of the new technology was invented.

Proposed law: Provides for a National Commission on New Technological Uses of Copyrighted Works. The composition of the Commission would be four authors/copyright owners; four users, four public members; and the Librarian of Congress.

Ad Hoc Committee's recommendations: The Ad Hoc Committee proposed the idea of a National Commission originally. The Commission's function is to study and make recommendations to the Congress on copyright problems emanating from the emerging technologies. The Ad Hoc Committee, however, feels that the Commission should be an independent body and not part of the Library of Congress. It feels further that the Commission should have nine public members rather than four proponents from the proprietors and four from the user groups. A broadly-based distinguished group of citizens serving as public members, with no Library of Congress representation, would be more effective than the plan proposed. This would insure that the public would have the major role in decision-making.

The Ad Hoc Committee further proposes that in the interim, until the National Commission on New Technological Uses of Copyrighted Works has made its study, input into computers for nonprofit school uses should not be considered an infringement of copyright.

g. Educational/instructional broadcasting

Present law: No mention made.

Proposed law: Specific limits set on educational broadcasting's use of copyrighted works.

Ad Hoc Committee's recommendations: Limited educational exemption should apply to instructional broadcasts--the same as for other instructional materials--but not to public broadcasting. Uses of copyrighted materials on public broadcasting would be subject to a compulsory licensing arrangement.

6. What is the Ad Hoc Committee's Position regarding a Clearinghouse or Statutory Licensing System?

Educators have certain fears regarding a clearinghouse.

a. It will tend to erode "fair use."

b. It will not be mandatory on all copyright owners.

/more on clearinghouse/

c. It will be subject to escalating fees.

d. It will not cover all types of materials.

e. It would be difficult to administer.

f. The only plans we've heard discussed thus far exclude representation of user interests in the control of the systems.

To be acceptable a clearinghouse must meet several criteria:

a. It must be over and above "fair use"--not in lieu of "fair use."

b. It must be mandatory on all copyright proprietors.

c. It must cover all types of materials.

d. It must be free from "administrivia."

Let's have a law first, then work out a system of clearances and royalty payments on those uses which are over and above fair and exempted uses in the law. Do first things first.

7. How does the Ad Hoc Committee interpret its request for a "limited educational exemption"?

The Ad Hoc Committee recommends that the copyright law be written specifically to authorize teachers to make copies or recordings for purely noncommercial teaching purposes on a limited basis of the following:

--a poem
--a short story
--an essay
--a map
--an article from a magazine or newspaper
--transparency of a chart from a newspaper or from a text for classroom use
--transparency of a graph or diagram from a book, newspaper or a magazine
--a TV or radio program within 5 days after the recorded broadcast, then erased
--a recording of a school orchestra for the purpose of self-evaluation
--excerpts or quotations from copyrighted works (such as excerpts from contemporary writings in a duplicated examination).

The Ad Hoc Committee is NOT asking for the right to make a single copy of an entire book or novel; a dictionary, reference book, encyclopedia, magazine, newspaper, pamphlet or monograph; a workbook or standardized test; a motion picture or a filmstrip. The Committee is NOT asking for the right to make copies of materials originally consumable upon use, such as workbook exercises, problems, answer sheets for standardized tests.

The House Report (No. 83, 90th Congress) has correctly assessed what educators need when it states on Page 30:

"The group representing educational and scholarly organizations argued further that the doctrine of fair use alone is insufficient to provide the certainty that teachers and other nonprofit educational users of copyrighted material need for their own protection. They emphasized that teachers are not interested in mass copying that actually damages authors and publishers, but that they need to be free to make creative use of all of the resources available to them in the classroom, and that this necessarily involves some reproduction and distribution of copyrighted works such as contemporaneous material in the press, isolated poems and stories for illustrative purposes, and the like. Representatives of the educational group contended that a statute subjecting the use of modern teaching tools to requirements for advance clearance and payment of fees would inhibit use of teachers' imagination and ingenuity, and they proposed adoption of a specific, limited exemption for educational copying that would apply the 'not-for-profit' limitation of the present law."

March 1973

Section . Limitations on exclusive rights: Reproduction for teaching, scholarship and research

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.

For purposes of this section,

(1) "use" shall mean reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process;

(2) "portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from copyrighted works, except that it shall also include

(a) the whole of short literary, pictorial and graphic works

(b) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, provided that

i) a method of recording retrieval of the stored information is established at the time of reproduction for storage, and

ii) the rules otherwise applicable under law to copyrighted works shall apply to information retrieved from such systems;

(c) recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works which are

(a) originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests;

(b) used for the purpose of compilation within the provisions of Section 103(a).

Exhibit A

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

American Association for Higher Education
American Association of Colleges for Teacher Education
American Association of Junior Colleges
American Association of Law Libraries
American Association of School Administrators
American Association of School Librarians
American Association of University Women
American Council on Education
American Educational Theatre Association, Inc.
American Library Association
Association for Childhood Education International
Association for Computing Machinery
Association for Educational Communications and Technology
Association of Research Libraries
Baltimore County Schools
College English Association
Corporation for Public Broadcasting
Council on Library Resources
International Reading Association
Joint Council on Educational Telecommunications, Inc.
Medical Library Association
Modern Language Association
Music Educators National Conference
Music Teachers National Association
National Art Education Association
National Association of Educational Broadcasters
National Association of Elementary School Principals
National Association of Schools of Music
National Catholic Educational Association
National Catholic Welfare Conference
National Contemporary Theatre Conference
National Council for the Social Studies
National Council of Teachers of English
National Council of Teachers of Mathematics
National Education Association of the United States
National Instructional Television Center
National Public Radio
National School Boards Association
Public Broadcasting Service
Speech Communication Association

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interested observers

American Association of University Professors
American Home Economics Association
American Personnel and Guidance Association
Associated Colleges of the Midwest
Association of American Law Schools
Association for Supervision and Curriculum Development
Federal Communications Commission
National Congress of Parents and Teachers